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In The
Supreme Court of the United States

October Term, 1985

Secretary of State of the State of Washington,
RALPH MUNRO,

Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.

Appellees.

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF THE LIBERTARIAN PARTY
OF WASHINGTON AS AMICUS CURIAE
IN SUPPORT OF APPELLEES**

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I. THE INTEREST OF AMICUS CURIAE

This case is of vital concern to the Libertarian Party of Washington ("the Party") which was formed in 1972 and has since participated in every election in the state.^{1/} Until the 1980

^{1/} The Party is filing this brief in support of the position of Appellees. Both parties have consented to its filing and the consents are filed with the Court.

The Party is a state affiliate of the National Libertarian Party, which was formed in Colorado in 1971. The National Libertarian Party's history closely parallels that of its Washington state affiliate. The national party achieved steady increases in candidacies and voter support until the 1984 election, when increasingly burdensome ballot access laws crippled the Party's campaigns across the country.

<u>Presidential</u> <u>Elec.</u>	<u>Yr.</u>	<u>State Ballot</u> <u>Listings</u>	<u>Popular</u> <u>Votes</u>
1972*		3	2,691
1976**		31	171,627
1980***		50	920,049
1984****		40	227,204

(Cont'd)

United States Senatorial campaign, the Party, like other "third" parties, was able to offer its candidates for statewide offices to the voters in the general election. For example, in 1976, the Party's candidate for the United States Senate, Richard K. Kenney, appeared on the general election ballot in November, pursuant to then applicable ballot access statutes which provided for third party nominations by convention, and for general election ballot

Sources:

*Statistics of the Presidential and Congressional Election, (hereinafter "Statistics") of November 7, 1972, p. 52 (U.S.G.P.O. 1973);

**Statistics of November 2, 1976, p. 56, (U.S.G.P.O. 1977);

***Statistics of November 4, 1980, p. 72, (U.S.G.P.O. 1981); and

****Statistics of November 6, 1984, p. 69 (U.S.G.P.O. 1985).

The resulting ballot access cases are summarized at page 5 below.

access by voter certificates.^{2/}

In 1977, however, the Washington statutes were amended to include the one percent primary vote requirement that is now being complained of by the Socialist Workers Party ("SWP") in this case. In 1980, Richard K. Kenney was again the Party's candidate for U.S. Senator. Despite his personal qualities and prior experience as a candidate, and his diligence as a campaigner, Mr. Kenney was unable to appear as a candidate on the general election ballot because of the one percent requirement in the statute as amended in 1977.^{3/}

^{2/} See Wash. Rev. Code §§ 29.24.020; 29.24.030; 29.24.040; 29.30.100 (1965) (amended 1977). See also Socialist Workers Party v. Secretary of State, 765 F.2d 1417, 1418 (9th Cir. 1985).

^{3/} The background of the 1980 Kenney campaign is set forth more fully in the Affidavit of Bonita L. Olson, attached hereto as Appendix "A."

Like the SWP, the Libertarian Party of Washington is also unquestionably a serious political party offering a thoughtful alternative to the two major parties' philosophies and candidates. As such, the Party has already been, and will likely continue to be, as directly affected as has the SWP by the restrictive ballot access statute involved in this appeal. Under the one percent requirement there may not be another statewide opportunity for the Party's candidates to educate and inform the voters about their views on the issues, the Party's philosophy and its differences from the major parties.

In this brief, the Party will present its experience and positions in regard to the Washington statute and its

damaging effects on the Party's operations and prospects. The Party - like the national Libertarian Party and other Libertarian Party affiliates across the country^{4/} - must now seek and support judicial redress to confront this threat to its rights and the rights of the

^{4/} The Libertarian National Committee filed a Brief amicus curiae in Anderson v. Celebrezze, 460 U.S. 780 (1983). Other Libertarian Party state affiliates have filed the following access cases: Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985); Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985); Libertarian Party v. Davis, 601 F. Supp. 522 (W.D. Ky. 1985); Libertarian Party v. Manchin, W.Va., 270 S.E.2d 634, appeal dismissed 449 U.S. 802 (1980); Libertarian Party of Alabama v. Wallace, 586 F.Supp. 399 (M.D. Ala. 1984); Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983); Libertarian Party of Nebraska v. Beerman, 598 F. Supp. 57 (D. Neb. 1984); Libertarian Party of Oklahoma v. Oklahoma State Election Board, 593 F. Supp. 118 (W.D. Ok. 1984); Libertarian Party of South Dakota v. Kundert, 579 F. Supp. 735 (D.S.D. 1984); Libertarian Party of Texas v. Fainter, 741 F.2d 728 (5th Cir. 1984); and Libertarian Party of Virginia v. Davis, 766 F.2d 865 (4th Cir. 1985) cert. den. 54 U.S.L.W. 3582 (U.S. Feb. 24, 1986) (No. 85-964).

voters.^{5/} The amicus Party and the SWP clearly have widely divergent political philosophies regarding the national economy, the proper role of government and the rights of the individual.^{6/}

^{5/} Others have noted the resource draining effect of ballot access litigation. See e.g., Note, "The Supreme Court, 1982 Term," 97 Harv. L. Rev. 70, 163 (1983), citing Frampton, "Challenging Restrictive Ballot Access Laws on Behalf of the Independent Candidate, 10 N.Y. U. Rev. L. & Soc. Change 131, 133 (1981).

^{6/} See e.g., Appellee's Motion to Affirm or Dismiss, p. 5 n.2 regarding the philosophy of the SWP. The basic tenets of the Libertarian Party of Washington are:

STATEMENT OF PRINCIPLES

We, the members of the Libertarian Party, challenge the cult of the omnipotent state and defend the rights of the individual.

We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose.

Governments throughout history have regularly operated on the opposite principle, that the (Cont'd)

Whatever their philosophical and political differences, however, the interests

State has the right to dispose of the lives of individuals and the fruits of their labor. Even within the United States, all political parties other than our own grant to government the right to regulate the lives of individuals and seize the fruits of their labor without their consent.

We, on the contrary, deny the right of any government to do these things, and hold that where governments exist, they must not violate the rights of any individual, namely, (1) the right to life - accordingly we support prohibition of the initiation of physical force against others; (2) the right to liberty of speech and action - accordingly we oppose all attempts by government to abridge the freedom of speech and press, as well as government censorship in any form; and (3) the right to property - accordingly we oppose all government interference with private property, such as confiscation, nationalization, and eminent domain, and support the prohibition of robbery, trespass, fraud, and misrepresentation.

Since governments, when instituted, must not violate individual rights, we oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by government to deal with one another as free traders, and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

of the amicus Party and the SWP are, for once, the same with regard to the constitutional protection of their fundamental rights to exist, to seek adherents and to have the opportunity to affect the course of political life in our society. This appeal represents a critical juncture on these issues for the future of the amicus Party, the SWP and all other third parties in the State of Washington, and likely in other states as well, should this statute be upheld.

II. SUMMARY OF ARGUMENT

This brief respectfully urges this Court to affirm the decision of the Court of Appeals holding Washington Rev. Code Ann. § 29.18.110 (West 1986) to be an unconstitutional burden on Appellees'

rights.

This Court and other authorities have long recognized the important functions performed by third parties in American politics, as forums for new ideas, and as release mechanisms for voters dissatisfied with the positions and candidates of the major parties. Point III. A.1.

Because of the critical importance of meaningful ballot access for the future survival of the third parties, this Court has protected the rights of third parties, such as those of Appellees and the amicus Party, and their voters' access to the ballot. Point III. A.2.

Under this Court's ballot access jurisprudence, the Court of Appeals properly analyzed the actual effects of

the Washington one percent requirement on third party candidacies and concluded that the requirement was unduly burdensome, due to its virtually complete exclusion of third party candidates from the Washington statewide ballot since 1977. Point III. B.

Similarly, the Court of Appeals properly concluded that, under this Court's "totality" rule, the Washington statutory scheme was also unconstitutionally burdensome because its early deadline - one of the earliest in the country - unfairly impacts on third party candidates who must be nominated before the major party candidates file or are finally nominated. Point III. C.

On these bases, this Court should now affirm the decision of the Court of Appeals in this case to ensure meaning-

ful ballot access for third parties and their future ability to perform their important functions in our political system.

III. ARGUMENT

A. The Court of Appeals Properly Upheld the Appellees' Constitutionally Protected Right to Ballot Access in Statewide Elections

1. Third Parties Perform Important Functions in American Politics.

In the context of our emerging Republic, some of the Framers of the Constitution were concerned about ours becoming a political system dominated by two major parties.^{7/} Others, however,

^{7/} "The Supreme Court, 1982 Term," 97 Harv. L. Rev., 70 at 159, 161 n.37 (concerning James Madison). See also Note, "Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines," 11 Hofstra L.R., 691, 692 n.6 (concerning John Adams).

were concerned about excessive "factionalizing" or "splintering" of the political groups in our society.^{8/} This Court, and other authorities, have noted the history of these opposing concerns in the development of its ballot access jurisprudence.^{9/} In addition, the progressive "Short-Ballot" reform movement, and the subsequent reaction to its policies favoring broader ballot access, have also been noted as being relevant to the question of ballot access for third parties.^{10/} Both of these historical analyses are particularly rele-

^{8/} Id.

^{9/} See, e.g., Storer v. Brown, 415 U.S. 724, 735, 736 (1974).

^{10/} See, e.g., Lubin v. Panish, 415 U.S. 709, 712 (1974). See also Elder, "Access to the Ballot by Political Candidates." 18 Dick. L. Rev. 387, 389 (1979) (hereinafter "Elder").

vant to this case because of the State of Washington's argued justifications for restricting ballot access.^{11/}

Despite the Framers' concerns on both sides of the question, and notwithstanding the "Short Ballot" movement, third parties have long been part of American political life. Throughout our history, third parties have served a variety of useful purposes including providing forums for new, sometimes unpopular, ideas and by acting as "safety" or "release" mechanisms, particularly in times of great social and political stress.^{12/} More recently,

^{11/} The State's arguments for the one percent requirement - demonstrating community support and lessening voter confusion - will be more fully discussed below.

^{12/} This Court and other authorities have long recognized these important functions of the third parties in American society. See e.g., (Cont'd)

third party "alternatives" have provided platforms focusing voter discontent with the major parties positions on national issues.^{13/} Without this so-called "safety valve," the "splintering" and "factionalization" that concerned some of the Framers is rather more likely to occur than not.^{14/} Ensuring third par-

Sweezy v. New Hampshire, 354 U.S. 234, 250-1 (1957); Anderson v. Celebrezze, 460 U.S. 780, at 794 (1983) and the Brief amicus curiae of the American Civil Liberties Union in Anderson, App. 5A regarding the "safety valve" role of third parties. See also Elder, op. cit., at p. 392 ("release valve") and "Developments in the Law - Elections," 88 Harv. L. Rev. 1111, 1123 (1975) (third parties "perform important functions in the political process" and provide "an outlet for frustration.")

^{13/} See, e.g., Note, "Ballot Access Laws in West Virginia - A Call for Change," 87 W. Va. L. R., 809, 814 (1985).

^{14/} The recent developments in the Illinois Democratic primary provide a current example of this result. See Malcolm, "Stevenson Hopes to Run for Illinois Governor as Independent," N.Y. Times, A 16, March 28, 1986 and Malcolm, "LaRouche Illinois Drive Focused on Rural Areas," N.Y. Times, A 14, March 31, 1986. See (Cont'd)

ties real access to the ballot is, however, a necessary prerequisite to their continued functions as a means of fostering innovation and of ensuring peaceful, productive dissent.^{15/}

2. Meaningful Ballot Access for Third Parties is Critical to their Survival and Warrants this Court's Protection.

In its opinion, the Court of Appeals correctly followed this Court's precedents in finding Washington Rev. Code section 29.18.110 (West 1985) unconstitutional as unduly burdensome on

also, LaRouche v. Crowell, cert. denied, 54 U.S.L.W. 3582 (U.S. Mar. 3, 1986) (No. 85-1151).

^{15/} See Elder, op. cit., p. 392 ("If serious minor candidates representing such (new and unpopular) views were denied an electoral forum because they were precluded from placement on a ballot, then dissident pressure might explode in more destructive, less legitimate ways."). See also, Note, "The Supreme Court 1968 Term," 83 Harv. L. Rev. 60, 89 (1969) (third parties provide a "peaceful means to be heard").

the First and Fourteenth Amendment rights of the Appellees here. 765 F.2d at 1418. This Court's decisions on ballot access clearly support this finding by the Court of Appeals:

In the present situation, the state laws place burdens on two different, although overlapping, kinds of rights - the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.

Williams v. Rhodes, 393 U.S. 23, 30 (1968)

By carefully applying the analytic process established by this Court in

Anderson v. Celebrezze, 460 U.S. 780 (1983), the Court of Appeals properly concluded that the record in this case demonstrated "that Washington's ballot access law seriously impinged upon these protected rights" and that the state "had failed to present an interest substantial enough to warrant the restraint imposed on those rights." 765 F.2d at 1422. In reaching these conclusions, the Court of Appeals relied on Anderson and other ballot access decisions of this Court in a manner consistent with relevant decisions of other federal courts.^{16/} As noted, in its still-developing ballot access jurisprudence, this Court has emphasized both the associational and free choice aspects of these

^{16/} See, e.g., Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985).

cases while basing its "conclusions directly on the First and Fourteenth Amendments." Anderson, 460 U.S. at 786 n.7. The Washington statutory scheme, by effectively denying ballot access to third parties, has particularly grave implications for such emerging parties. Access to the ballot is particularly critical to third parties as a means of "disseminating ideas"^{17/} and, thus, to the future potential for such parties -

^{17/} See, e.g., Illinois Election Bd. v. Socialist Workers Party, 440 U.S. 173, 186 ("an election campaign is a means of disseminating ideas as well as attaining political office.... Over-broad restrictions on ballot access jeopardize this form of political expression.") See also, "Developments in the Law - Elections," 88 Harv. L. Rev. 1111, 1123 (1975) ("Without this (third party) alternative, dissatisfied voters who find themselves repeatedly confronted with unattractive policies and candidates may come to doubt the legitimacy of the entire electoral process. It is therefore plain that the importance of independent and minor party candidates transcends their ability to capture electoral office.")

whatever the outcome of the instant elections involved. This concern is also consistent with this Court's own decisions on these issues:

New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

Williams, 393 U.S. at 32.

Similarly, in Anderson, this Court noted this dissemination function of ballot access rights so critical to emerging parties:

The exclusion of candidates also burdens voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.

Anderson, 460 U.S. at 787-8. (emphasis added).

As the Court of Appeals found in this case, the Washington statutory scheme "deprives citizens of the opportunity to organize, campaign and vote outside the framework of the dominant political parties." 765 F.2d 1422 (emphasis added). All three activities in this process are directed toward the "basic incentive" of participation in the election of candidates. Thus, Washington's elimination of all real ballot access deprives its third parties "of much of the substance, if not the form, of their protected rights." Williams v. Rhodes, 393 U.S. at 41 (Harlan J., concurring). Without the present availability of such a "basic incentive" of participation, these parties may not have a future in the State of Washington.

On another issue of great relevance to third parties, in its ballot access jurisprudence this Court has also emphasized the fundamental nature of "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. at 30 (emphasis added).^{18/} The right to vote, by itself, would be meaningless to adherents of third parties unless the laws also provide "voters the opportunity to vote for the candidates of their choosing." Bullock v. Carter, 405 U.S. 134 at 144 (1972).

^{18/} See also Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.")

Thus, the State of Washington, by merely granting the SWP and its voters the right to "organize, campaign and vote" in what is, for them, an essentially meaningless "blanket primary," has not satisfied even the rudiments of true ballot access. Clearly, this, at best, merely preliminary access to third party candidates by the voters "has diminished practical value if the party can be kept off the ballot." Williams v. Rhodes, 393 U.S. at 30 (1968). In other words, the voters of Washington seeking to express their preference at the polls for third party candidates in statewide contests since 1977 have indeed found that, with a sole exception in 9 years, their "vote may be cast only for major party candidates at a time when other parties ... are clamoring for

a place on the (statewide) ballot." Williams v. Rhodes, 393 U.S. at 31 (parenthetical added).

The Washington statutory scheme, by its almost total exclusion of third party candidates, violates one of the most basic tenets of true ballot access:

It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.

Lubin v. Panish, 415 U.S. 709, 716 (1974).

As this Court noted in Anderson, this near complete exclusion of any such alternative candidate surely justified the careful examination by the Court of Appeals.^{19/} Clearly, by this Court's

^{19/} See Anderson, 460 U.S. at 793, n.15 quoting, with approval, L. Tribe, American Constitutional Law, (1978) 774 ("But courts (Cont'd)

precedents, the State of Washington's statutory scheme - including the "totality of the so-called one percent requirement and the early deadline for third party candidates" - when viewed in toto vitiates the Appellees' ballot access rights completely.

B. The Court of Appeals Properly Found the Washington Statute's One Percent Requirement to be Unconstitutionally Burdensome As Applied

In making its determination that the one percent requirement was unconstitutionally burdensome, the Court of Appeals examined the record of state elections before and after the 1977 amendment adding the restriction.^{20/} In

quite properly 'have more carefully appraised the fairness and openness of laws that determine which political groups can place any candidate of their choice on the ballot.'")

^{20/} 765 F.2d at 1419-20. This examination of (Cont'd)

its actual application, the one percent requirement fails to meet constitutional muster under any rubric or factual standard derived from this Court's and others' relevant ballot access precedents.

Despite the mass of data provided by the State - much of it irrelevant to the statewide election issue - even the State admits that only one third party candidate has appeared on the statewide ballot since 1977.^{21/}

actual results is consistent with this Court's approach in Mandel v. Bradley, 432 U.S. 173, 178 (1977). See also Bergland v. Harris, 767 F.2d 1551, 1555 (11th Cir. 1985).

^{21/} This admission by the State appears in various forms:

That success (in achieving the ballot) has been somewhat less with respect to statewide offices.

Juris. State., p. 6.

(T)hey (the third parties) have not been successful at qualifying candidates for the state general election ballot for statewide offices, such as (Cont'd)

Based on these statements and the Court of Appeals' own analysis, 765 F.2d 1419, the existence of an impermissible "freeze" on third party candidates in Washington is beyond argument.^{22/} By

U.S. Senate."

Juris. State., p. 6 quoting the Affidavit of Supervisor of Elections, Donald F. Whiting, Ex. A, p. 5.

Two candidates appeared on the (1984) general election ballot for statewide office, one being a minor party candidate and the other an independent.

Appellant's Brief, p. 9.

To be sure, most of these (third party) candidates were running for positions which were elected in less than statewide areas. For statewide offices, minor party candidates have not done well since 1977.

Appellant's Brief, p. 22. (emphasis added) See also Appellee's Motion to Affirm or Dismiss, p. 8 ("(T)hrough 1984, only eight third party candidates even attempted to qualify, and seven of those were eliminated by the new restrictions.").

^{22/} Given that only one third party candidate in Washington has been permitted to appear on the statewide general ballot since 1977, the "blanket" primary and the one percent (Cont'd)

contrast, nothing that the State presented to the Court of Appeals or to this Court by way of justification can conceivably excuse the fact that third party candidates have been "substantial-ly barred" from the Washington general election ballot since 1977 by the one percent requirement.^{23/}

The State's main arguments below in

requirement can also readily be described as "obstacles" (Williams v. Rhodes, 393 U.S. at 25, n.1) or an "entangling web" (Jenness v. Fortson, 403 U.S. 431, 437 (1971)) thus "chilling," (Anderson v. Mills, 664 F.2d 600, 609 (6th Cir. 1981)) "crippling" (Williams, 393 U.S. at 33), or "suffocating" (Jenness, 403 U.S. at 438) third party ballot access so as to make such access "virtually impossible" (Williams, 393 U.S. at 24) or "merely theoretical" (Jenness, 403 U.S. at 431). Similarly, the resulting exclusion of third party candidates can quite accurately be described as a "complete monopoly" (Williams, 393 U.S. at 32) by the two major parties which thus have a "decided advantage" over these newer parties (Williams, 393 U.S. at 31).

^{23/} 765 F.2d at 1419. See also 765 F.2d at 1421 ("Indeed, we can think of no state interest, and the authorities suggest none, that would necessitate the virtually complete exclusion of serious-minded minor parties seeking access to the ballot.").

attempting to justify its statutory scheme were merely repetitions of two now familiar themes in ballot access cases: ensuring sufficient community support and preventing voter confusion. As the Court of Appeals noted, ensuring community support cannot by itself justify the one percent requirement for ballot access. 765 F.2d 1420. A denial of access can only be justified by furtherance of other legitimate state interest such as preventing voter confusion. Here, as the Court of Appeals found, there is no evidence of any such voter confusion which would justify the "substantial foreclosure of minor parties from the general election ballot." 765 F.2d 1420.

In its Jurisdictional Statement and its Brief to this Court, the State repeats these themes, arguing first that "diligent" and "attractive" candidates

can and have met the one percent requirement "in congressional and local races," (Juris. State. p. 10) and then that "a reasonably diligent candidate, with a reasonably appealing campaign, can surely meet Washington's one percent requirement, as the history of minor party and independent candidates shows."^{24/} Appellant's Brief, p. 11. Again, the State is merely attempting to justify its own "draconian" solution to its perceived "voter confusion" by "counterarguing" about the lack of diligence or appeal of the third party candidates to save a system which has had only one minor party statewide candidate since 1977.^{25/} Here, the "remedy" far

^{24/} See, on these issues, the Affidavit of Bonita L. Olson, attached hereto as App. A.

^{25/} Compare, Appellant's Brief, p. 22 ("(T)he 1977 change appears to have reduced the wide proliferation of minor party participation in November general elections And this is (Cont'd)

exceeded the perceived "problem".^{26/}

As the State concedes, the Washington "blanket" primary and general elec-

probably as the legislature intended.") With 765 F.2d at 1419 ("There is some indication that Washington's legislature simply underestimated the adverse impact of the statutory revision upon minor party access to the general election ballot.")

^{26/} In its Brief, at p. 19, n.10, the State also attempts to justify the one percent requirement by relying on the five percent minimum in the Federal Election Campaign Act as upheld by this Court in its opinion in Buckley v. Valeo, 424 U.S. 1, 96 (1976). This strained analogy - for that is all it is - is far from apt, however. This Court has noted the difference in kind between ballot access and public financing in comments just before the statements from Buckley quoted and relied on by the State:

Accordingly, we conclude that public financing is generally less restrictive of access than the ballot-access regulations dealt with in prior cases. Buckley v. Valeo, 424 U.S. above at 95.

There is an obvious linkage between public financing and communication for the purpose of persuading voters. Clearly, however, without ballot access, all of this sought-after public financing and media communication is purposeless. See also, Elder, op. cit. p. 387 ("Sufficient campaign funding for the purchase of vital mass media advertising before an election will mean little if a potential candidate cannot obtain a place on the ballot.")

tion system is actually a "two-step" process. Appellant's Brief, p. 19. In reality, the first part of the process now operates to "screen" (765 F.2d at 1421) out third party statewide candidates and the second part serves as a "runoff" between the two major parties. Such a system has the effect of eliminating all but the final traditional inter party rivalry between the two major parties.

This process is hardly the same "direct" primary system described in Storer v. Brown, 415 U.S. 724 (1978), the case from which the State has drawn only a partial quotation of this Court's description of a primary in opening its "Summary of Argument." Appellant's Brief, p. 9. Indeed, the next two sentences of the Storer quote raise ques-

tions about Washington's own use of the "primary" terminology for its September "first step" process:

The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general ballot is reserved for major struggles; it is not a forum for continuing intra party feuds.

Storer, 415 U.S. at 735. (emphasis added)

Thus, despite all of the State's attempts to describe this process as involving access to the "ballot" in the "primary" election, there is a serious question whether either term is really appropriate.^{27/} Here, in the so-called

^{27/} Indeed, at least one of the several definitional variants of "ballot" suggests the necessary connection between the word "ballot" and an actual election:

(Cont'd)

"primary," nominated third party candidates are matched against typically many more major party candidates who are all still seeking their party's nominations,^{28/} - hardly a "primary" as described above in Storer. Then, in addition to this "apples and oranges" quality, the State imposes a one percent

A slip of paper bearing the names of the offices to be filled at a particular election and the names of the candidates for whom the elector desires to vote. Black's Law Dictionary p. 182 (4th Ed. 1968).

Since the third party candidates are already nominated, the only "election" possible here for them is to be on the general election ballot.

^{28/} The detriment to the already-nominated third party candidates can best be expressed by quoting the Court of Appeals' decision, 765 F.2d at 1420 ("The primary ballot for the special election of the United States Senate in 1983 bore the names of 33 office seekers - 18 candidates from the Democratic Party, 14 candidates from the Republican Party, and the single nominee of the Socialist Workers Party.") The other effects of this disparity in the numbers and status of the candidates will be discussed more fully below.

cutoff before any candidate - even one chosen by his party - can be eligible to be actually elected on the only real ballot involved - i.e., the general election ballot. Here the State has wholeheartedly endorsed a hybrid "primary" election system that benefits the major parties by simultaneously eliminating already-nominated third party candidates and eliminating contesting candidates within the major parties, as do traditional "primaries" such as that described above in Storer.

It must be re-emphasized that the Washington statutory scheme is unique and anomalous in these respects, as the Court of Appeals noted. 765 F.2d at 1421.^{29/} Indeed, no other state statute

^{29/} See 765 F.2d at 1421 for the Court of Appeals' discussion of Socialist Workers' Party (Cont'd)

researched by amicus contains similarly restrictive provisions, even where so-called "open" primaries are statutorily mandated.^{30/} Surely, the concept of the states serving as "laboratories" does not excuse this kind of deviation from

v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982) and Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977) regarding the Michigan statute as being "similar in terms and exclusionary impact" and noting that the Michigan Supreme Court had held that statute unconstitutional "in light of the exclusion of minor parties from the general ballot in two subsequent elections."

^{30/} Only two states have "blanket primaries" and 9 have so-called "open primaries." See Tashjian v. Republican Party of Connecticut, prob. jur. ntd. 54 U.S.L.W. 448 (U.S. January 14, 1986) (No. 85-766), Brief of Appellant, pp. 57-58. In one state, Louisiana, the "blanket primary" may actually serve as an election if any candidate receives more than 50% of the total votes cast. If no one candidate receives more than 50%, the two highest votegetters are then "run-off" in the November election. See La. Rev. Stat. Ann. §§ 18:401, 511 (West 1986). Obviously, this Louisiana system bears more of a relationship to a real "ballot" because of the chance of actual election and the

constitutional norms. See Appellant's Brief at p. 13, n.9.

Despite the State's inapt analogies to Jenness v. Fortson, 403 U.S. 432 (1971) and American Party v. White, 415 U.S. 767 (1974), Appellant's Brief at 11, there can be no serious question that this Court's precedents guaranteeing third party ballot access are implicated by the exclusion of virtually all such candidates from statewide campaigns. Thus, the appellees and the amicus Party here can justifiably complain of the de facto monopoly of the Washington statewide general election ballot by the two major parties, what-

irrelevance of any arbitrary percentage cutoff except the 50% needed to elect any candidate in the primary or, absent such a primary "winner," the two highest vote totals needed to run in the November election.

ever the original intent of the legislature.^{31/}

C. The Court of Appeals Properly Held That, Viewed in its Totality, the Washington Statutory Scheme is Unconstitutionally Burdensome

As noted by the Court of Appeals, under this Court's "totality" test,^{32/} the Washington statute is also unconstitutional because of the early deadline for third party nominations and resulting lack of opportunity for gathering support imposed by the statute only on

^{31/} This Court in Anderson noted the domination of the state legislatures by the two dominant parties. Anderson, 460 U.S. at 793, n. 16. The composition of the Washington State Legislature in 1977 - the date of passage of the one percent requirement - was as follows: Senate, 29 Democrats and 20 Republicans; House, 62 Democrats and 36 Republicans. Almanac of American Politics, p. 889 (1978).

^{32/} See, e.g., Williams v. Rhodes, 393 U.S. 23, 34 (1968); Anderson v. Celebrezze, 460 U.S. at 789 (1983).

the third parties. As the Court of Appeals noted:

(A) primary vote system for measuring required public support for a minor party nominee has the inherent effect of establishing a relatively early deadline, preventing independent-minded voters who might be attracted to a minor party nominee from basing their choice on significant events as they develop in the course of a campaign.

765 F.2d at 1421.

In effect, then, the first step of the Washington statutory scheme, or so-called "primary," pits the already-nominated third party candidates for statewide office against candidates still seeking the nomination of the two major parties in September, well in advance of the general election. At that point, issues are still being focused and the candidates' positions on emerging issues

are still being established.^{33/} In this "blanket primary" arrangement, some voters may indeed favor one of the losing candidates of the major parties marginally at this stage, but subsequently would prefer one of the eliminated third party candidates over either

^{33/} The effect of the earlier deadline on these statewide third party candidates is a state level version of the burden of early deadlines for national candidates described by this Court in Anderson, 460 U.S. at 80. As this Court also noted in Anderson, 460 U.S. at 785, n.5, regarding Mandel v. Bradley, 432 U.S. 172 (1977): "On remand, the District Court found that the early filing deadline imposed unconstitutional burdens on the plaintiff. Bradley v. Mandel, 449 F. Supp. 983, 986-989 (D. Md. 1978)." There, the District Court commented inter alia at 986, regarding the effects of an early deadline: "We find that the early filing date made it extremely difficult ... to attract coverage from the news media, both electronic and printed We find also that the early filing deadline unduly burdened Bradley's ability to raise money to finance his campaign.... The burdens placed on the Bradley campaign with respect to media coverage extended also to Bradley's efforts to make himself known by appearing before civic and other groups...."

of the major party candidates on the general election ballot. Having been preemptorily eliminated by their early nomination and resulting lack of support, the third party candidates never had a chance to be heard in a general election over the din of the major party candidates in the "primary."

In addition to the factors already noted by the Court of Appeals,^{34/} as the

^{34/} The Court of Appeals described the problem for third party candidates seeking public attention in this way: "(T)he focus of the primary is usually upon contested races between candidates for the nomination of the major parties, making it more difficult for the already nominated minor party office seeker to attract voter attention." 765 F.2d at 1421.

Similarly, in its decision overturning the Michigan primary percentage requirement - which, as noted above, is the closest precedent to this case - the Michigan Supreme Court emphasized the particularly burdensome effects of imposing such restrictions on ballot access at the primary election level:

This effect is heightened where, as
(Cont'd)

attached affidavit of a Libertarian Party election campaign official notes, media access for candidates of third parties is quite difficult during the primary campaign and then improves significantly during the general election campaign.^{35/} See, e.g., Anderson, 460 U.S. at 792. See also, Affidavit of

here, restrictions on access work to eliminate political and ideological alternatives at the time major candidates are selected and before campaigning has identified and sharpened the issues affecting the electorate.

Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1, 6-7 (1982) (emphasis added)

Clearly, the same reasoning adopted by the Michigan Supreme Court is applicable to the Washington statute.

^{35/} The lack of public interest in the primary has already been noted by the Court of Appeals. 765 F.2d at 1421 ("Support may be drawn only from the limited group actually voting in the primary election.")

Bonita L. Olson, attached hereto as App. A. Cutting off ballot access before the general election, as the Washington statute does, thus even further reduces the third parties' ability to disseminate their ideas and to educate the voters on their alternate philosophies.^{36/}

The early deadline for candidates clearly unfairly impacts on third party candidates on two levels - first, the third party nominating conventions come even before the major party candidate filing dates,^{37/} and second, the actual

³⁶ In addition, the public interest, media access, and ballot access problems of third party candidates may create fundraising problems, thus creating a vicious cycle. See Elder, op. cit. at p. 387.

^{37/} Compare Brief of Appellants, p. 6 ("The convention for minor party/independent nominations was rescheduled from the day of the primary to the Saturday before the filing (Cont'd)

choice of the third party nominees in July far precedes the final choice among the various major party nominees in September. Again, as with the virtually complete exclusion of third party candidates in statewide contests since 1977, the impact of the earlier dates falls

period"), with Brief of Appellants at p. 21 ("The filing deadlines for minor party and independent candidates are approximately the same as for major party candidates; they are within the same week.") (emphasis added) In fact, the relevant part of the applicable statute, Wash. Rev. Code § 29.24.020, reads as follows: "Any nomination of a candidate for partisan public office by other than a major political party shall only be made either: (1) In a convention held the last Saturday immediately preceding the first day for filing declarations of candidacy specified in RCW 29.18.030" Wash. Rev. Code 29.18.030, then provides, "The name of no candidate shall be printed upon the official ballot used at a state primary, unless not earlier than the last Monday of July nor later than the next succeeding Friday, a declaration of candidacy is filed in the form hereinafter set forth." Clearly, pursuant to these provisions, the third party candidates must be nominated a full week before the last day on which major party candidates are permitted merely to file for the primary.

only on the third party candidates. This unfair burden is precisely what this Court's ballot access precedents forbid. Anderson, 460 U.S. at 793.

In addition, the Washington statute does not fare well in a comparison with the deadlines for third party candidates in other states.^{38/} Only seven have earlier deadlines for third party or independent presidential candidates than Washington.^{39/}

^{38/} Ironically, it is just that early filing deadline for independents in Illinois that is likely to be an "obstacle" for Adlai Stevenson, III, the Democratic Party candidate for Governor in Illinois, who is now seeking to disassociate himself from his party's nominated candidates for lieutenant governor and secretary of state, as well as two downstate congressional nominations. According to news reports, Mr. Stevenson is planning to seek a legislative solution to the deadline or, failing that, to challenge it in court. See Malcolm, op. cit.

^{39/} The states' statutory provisions and (Cont'd)

The real issue with the early deadline, however, is that it, together with the "blanket primary" one percent requirement, operate "in tandem"^{40/} to burden third party candidates unfairly

deadlines for the only seven states with earlier deadlines than Washington are as follows:

<u>State</u>	<u>Statute</u>	<u>1988 Deadline</u>
KS	Kan. Stat. Ann. § 25-305 (1985)	June 10
ME	Me. Rev. Stat. Ann. tit. 21A § 354.8-A (1985)	June 14
NC	N.C. Gen. Stat. § 162-122 (1982)	June 24
IN	Ind. Code Ann. § 3 - 1 - 11 - 1 (West 1985)	July 1
FL	Fl. Stat. § 103.021(3) (West 1985)	July 15
OK	Ok. Stat. Ann. tit. 26 § 10-101.1 (West 1985)	July 15
TX	Tex. Code Ann. § 181.005(a), § 181.061(c) (Vernon 1986)	July 21

^{40/} See Storer v. Brown, 415 U.S. 724, 737 (1974).

and to preserve the "monopoly" of the two major parties in the State's elections and offices.

IV. CONCLUSION

For the reasons stated herein, the amicus Party respectfully urges this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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Counsel gratefully acknowledge the assistance of J. Benedict Centifanti, Law Clerk, in the preparation of this brief.

Appendix

APPENDIX "A"
(original filed with the Court)

No. 85-656

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE
OF WASHINGTON, RALPH MUNRO,

APPELLANT,

v.

SOCIALIST WORKERS PARTY, et al.,

APPELLEES.

AFFIDAVIT OF BONITA L. OLSON

1. I, the undersigned, am making this affidavit as part of the brief amicus curiae of the Libertarian Party of Washington in support of the Appellees in this case and for the position that Section 29.18.110 of the Revised Code of Washington, as applied to statewide third party candidates such as

those of Appellees or of the Libertarian Party, is unconstitutional.

2. I have personal knowledge of the facts set forth herein. I was campaign manager for Richard K. Kenney, Libertarian Party candidate for United States Senator for the State of Washington in 1980 until after the September primary, and I was campaign manager for Maurice Willey, Libertarian Party candidate for the Washington State Legislature, from the primary through the general election in 1980.
3. At the time of the 1980 U.S. Senate campaign, Richard K. Kenney was already a well-informed and experienced campaigner. He had already been the Libertarian Party candidate for the U.S. Senate in 1976 when he had polled 19,373 votes, or a total of 1.30% of the total vote for that office.
4. By the 1980 campaign, the Libertarian Party of Washington was much stronger and better organized than it had been in 1976, as indicated by its improved election results during the Presidential campaign that year in which the Libertarian Party Presidential candidate (Cont'd)

polled 29,213 votes as compared to only 5,042 votes in the 1976 election.

5. The 1980 Senatorial campaign for Richard K. Kenney was well organized on a statewide basis including, inter alia, the distribution of over 5,000 leaflets in July, August and September, 1980 by three teams of six people each across the state. A copy of that pamphlet is attached hereto and incorporated as Exhibit A.
6. Throughout the primary campaign in July, August, and September, press releases about the Richard K. Kenney campaign were sent out to every major television and radio station in the state and to most of the daily newspapers across the state.
7. During August and September, 1980, Richard K. Kenney toured the state speaking to local groups, giving press conferences and granting interviews to the media whenever they attended his briefings.
8. Prior to the primary in September, 1980 I personally found it to be very difficult to attract adequate press coverage for the Kenney campaign, despite his excellent qualities as a candidate and public speaker, because of a general lack of media and public interest in the primary campaign.

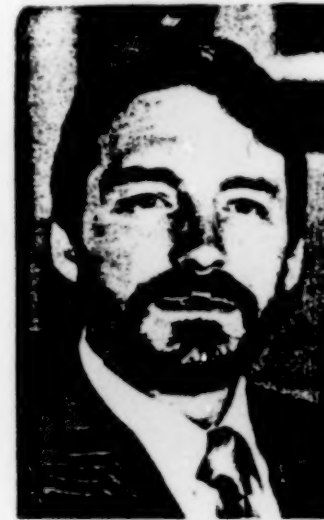
9. Although he was an experienced and charismatic candidate who diligently campaigned with well-organized support, Richard K. Kenney was not able to obtain the newly required 1% of the total vote cast in the primary for the office of U.S. Senator in 1980 as he had in 1976, and therefore his name did not appear on the general election ballot to the detriment of the support for the Libertarian Party's other candidates.
10. After the primary, when I served as campaign manager for Maurice Willey in the general election, media representatives actively sought press coverage of the Libertarian Party candidate and the public interest in the election increased significantly.
11. Because of the 1% requirement and the time and effort expended in the 1980 campaign for Richard K. Kenney, the Libertarian Party of Washington has never again tried to qualify another statewide candidate for U.S. Senator or Governor of Washington.

BONITA L. OLSON

Signed and sworn to before me on
April 7, 1986 by Bonita L. Olson.

Catherine G. Brumbaugh
Notary Public
State of Washington

My Commission Expires: 12/30/89



RICHARD KENNEY FOR SENATE

Joining Ed Clark in presenting the Libertarian alternative to Washington voters is Rich Kenney, candidate for U.S. Senate.

A message from Rich Kenney to the people of Washington:

"Libertarian positions are based on the belief that all individuals have the right to live their lives in any way that's peaceful. A similar view inspired the founding of our country, a view best expressed by Jefferson's Declaration of Independence.

"But today we suffocate under intrusive, oppressive laws and regulations. Both at home and abroad, the American government has become a danger to, rather than a protector of, liberty and life. With other Libertarians, I propose a fundamental change in government, away from paternalistic interference and toward respect for and defense of individual rights.

"Libertarian foreign policy emphasizes the need for providing adequate defenses against attack and for limiting the activity of our military to strictly defensive measures. This means we would not go to war simply because our standard of living was threatened by a politically caused rise in the price of middle east oil.

"Libertarian domestic policy emphasizes both civil liberties and economic freedoms, which means an end to harassment of those whose only 'crime' is being different and an end to the innumerable restrictions upon mutual exchange and to privileges some firms are awarded over others.

"A Libertarian elected to the Senate means a consistent champion of peace and freedom."

WASHINGTON'S ALTERNATIVE IN 1980